IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ, Plaintiff, vs. PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon CORPORATION, Defendants.	)	Circuit Court Case No. 0002-01376

TRANSCRIPT OF PROCEEDINGS
Volume 25-B

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Roosevelt Robinson, Judge of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 11:00 p.m., Tuesday, February 12, 2002.

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APPEARANCES:

Mr. D. Lawrence Wobbrock, Attorney at Law
Mr. Charles S. Tauman, Attorney at Law
Mr. Richard A. Lane, Attorney at Law,
Appearing on behalf of the Plaintiff;

Mr. James L. Dumas, Attorney at Law,
Mr. John W. Phillips, Attorney at Law,
Appearing on behalf of the Defendant
Philip Morris, Incorporated and Defendant
Roths I.G.A. Foodliner, Incorporated;

ALSO PRESENT:
Mr. Herbert Pallant

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FEBRUARY 12, 2002: 11:00 P.M.

THE CLERK: Court is in session. Please remain seated.

THE COURT: All right. Bring the jury, please.

(Jury in.)

THE COURT: All right. Counsel, you may proceed with this witness.

MR. WOBBROCK: Thank you very much, Your Honor.

DR. DAVID BURNS,

was thereupon called as a witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:
Dr. David Burns retakes the witness stand.)

DIRECT EXAMINATION Cont'd.

BY MR. WOBBROCK:

Q Dr. Burns, I would now like to talk to you about the history of science and smoking.

Can you describe the evolution of the understanding of smoking and disease, what happened, how it progressed in the United States? And in that regard, I would like to ask you what the

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significance of articles like this were. And this is Exhibit 292.

A Well, as you saw just before the break, we had an epidemic, the epidemic of lung cancer. And people were very concerned about what caused it. So how would you go about finding out what caused lung cancer? There are lots of very complicated scientific methods that are used, but it's pretty much common sense.

The first thing you do is you collect a bunch of people with lung cancer in the hospital, and you see how they were different from people who didn't have lung cancer. And that was done. And what they found was that almost all the people with lung cancer were cigarette smokers and heavy smokers, and many fewer of the people who were admitted for other problems, you know, problems with the stomach or gallbladder disease, other kinds of problems, were cigarette smokers.

So the next thing that you do is you take a group of folks that didn't have anything wrong with them, and you would ask them about a bunch of things, how old they were, how much they smoked, when they started, those kinds of questions. And you would see what happens going forward in

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time.

The last one looked back. They already had cancer. They looked back, and so it's called retrospective studies. This is a prospective study, one that's looking forward. And you see who develops lung cancer.

And they did that. Lo and behold, the people who smoked developed much more lung cancer than those who didn't. Heavier smokers developed more lung cancer than light smokers. And when people quit, the rate at which they developed lung cancer declined relative to people who continued to smoke.

Then you would look at what's in the smoke. When you look at what's in the smoke, you find that there are cancer-causing chemicals in the smoke.

You then take that smoke, all of it together, and you apply it to the back of an animal. Smoke is nothing more, after all, than little, tiny particles floating in the air. So if you take and put that through a very fine filter, you suck it through a very fine filter, you can collect all of the material. That material is called tar. And if you remove the nicotine from it, you can place it on

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the back of an animal, and the animal developed cancer.

And you look at people in studies in autopsies, and you see changes in their cells that go from normal cells to pre-cancer, and they progress faster and more if they smoke.

Then you look at cells that folks cough up. The more somebody smokes, the more abnormal those cells are. And when they stop smoking, it often reverts back towards normal. That and a variety of other studies, scientific observations, put it all together, and you reach a judgment, a scientific judgment that this exposure cigarette smoking results in causes lung cancer.

That was done by the mid-1950s. And this is one article, 1952 Reader's Digest article where they began to present that information to the American public, to tell them what science knew on these different topics. And it was that information getting out that resulted in the fall in cigarette consumption that I showed you on the graph.

Q Did that fall in cigarette consumption have economic ramifications to the companies?

A Absolutely. The profit from cigarettes is enormous. It's one of the most profitable

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commercial products that exists. And if you sell fewer of them, you make much less in the way of profit.

Q Doctor, I want to bring your attention to a couple things mentioned in this article, if we can turn to the second page. You have a screen before you on the right there, too, sir.

A Okay.

Q If you can see over on the bottom right-hand a mention of Dr. Alton Ochsner. Can you remind the jury who he was and what he had to say about discovery of lung cancer in a patient to his medical students and then what was his role later on?

A Dr. Ochsner was the physician that I referred to earlier. He is one of the -- was, he is now dead -- one of the founders or inventors of being able to operate on the chest in the United States. That was a very difficult problem, because as soon as you open the chest, the lung collapses, so therefore it was not a simple thing to do to operate on someone's chest and have them either survive or recover successfully.

He was one of the individuals who was a pioneer. He identified early on in his practice

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that he was seeing lung cancer much more than he had been taught he should see it and that the people he was seeing it in were cigarette smokers. And he became quite active in terms of trying to present this information to the American public, even before the Second World War.

Q And on the second page, if we could, over here, bottom right in the same Reader's Digest article is the mention of Drs. Wynder -- did I say that right?

A Yes.

Q And Graham?

A Yes.

Q Again, what was their role? You mentioned that earlier. What was their role in all this issue?

A Well, Dr. Wynder was one of the scientists who has made contributions across many, many areas of tobacco and health. As a medical student, in conjunction with Dr. Graham, who was a senior scientist at that time, they did a study of people in the hospital with lung cancer, one of the studies that I talked about as retrospective, looking backwards. And they were one of the first studies to identify that people who had lung cancer were

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much more likely to be cigarette smokers than people who were in the hospital for other reasons. And so it was one of the first studies that linked cigarette smoking to the causation of lung cancer.

He also subsequently to the article described here went on to do the study where they painted the tar on the back of animals to produce cancer.

Q Doctor, of course, if this information was in Reader's Digest, it was in more formal scientific form in the medical publications at the time; is that correct?

A Absolutely. This describes an article that was published in 1950.

Q Of course, that would have been available for the tobacco companies, including Philip Morris, to look at and to be aware of?

A Absolutely.

Q Looking at Exhibits 006 and 313, this was published in January of 1954. It's called the Frank Statement to Cigarette Smokers. Are you familiar with this, Doctor?

A Yes, I am.

Q Was this a response to this rising awareness of a connection between smoking and lung

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cancer?
A Yes, it was.
Q And do you see at the bottom where it says, "We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business." Do you see that?
A I see that statement, yes.
Q "And we always have and always will cooperate closely -- very bottom line on the left-hand side -- with those whose task it is to safeguard the public health"?
A Yes, I see both of those.
Q Then on this one, that was published in 1962, Exhibit 313, some people call this "the subtle Frank". This was published in every newspaper, major newspaper in the country. It says, "We shall continue all possible efforts to bring the facts to light. In that spirit, we are all cooperating with the Public Health Service in its plan to have a special study group review all presently available research."
Are you familiar with that advertisement that was published in papers around the United States also?
A Yes, I am.

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Q In your opinion, Doctor, did Philip Morris keep these promises?
A No, they did not.
Q Now, getting back to the history of science and smoking in this country, are you familiar with what's known as the English Survey?
A Yes.
Q 1958.
MR. WOBBROCK: And Mr. Tauman, this is Exhibit 28, I believe.
BY MR. WOBBROCK:
Q Doctor, I'm just going to go through this with you briefly. The jury has heard about it in opening statement, but they haven't heard about it from a witness. They have only heard about it from me.
So can you tell us generally what this was?
A This was a report by these three individuals who had come from Great Britain, from the tobacco industry in Great Britain, to interview and discuss tobacco issues with the U.S. tobacco companies and others.
Q And just for the record and the jury's understanding, I misstated. This is Exhibit 20, not

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28.

And then we see, Doctor, on the front page an itinerary. Is it your understanding they actually visited these locations?

A Yes. My understanding is that they visited those locations and met with those individuals.

MR. PHILLIPS: Forgive me, Mr. Wobbrock, and I apologize for interrupting Dr. Burns, but this document was gone over with Dr. Benowitz, and exactly the same lines were shown to him. This is cumulative.

MR. WOBBROCK: Our emphasis is going to be quite different, Your Honor.

THE COURT: All right. But you did go over it with another witness. All right. I will let you proceed at this time.

BY MR. WOBBROCK:

Q And you see contacts here with the TIRC?

A Yes.

Q Tobacco Industry Research Committee?

A Yes.

Q What was that?

A That was the committee that was founded in order to dispense tobacco industry research grants

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described in the Frank Statement in 1953.
Q Okay. Then we see here in the introduction, "From our contacts in the U.S.A. and Canada, we sought information on the following: One, the extent to which it is accepted that cigarette smoke causes lung cancer?
A Yes.
Q And then causation of lung cancer, I would like you to -- I'll read it, and then I would like you to explain that to the jury, Doctor, its significance, okay?
"Causation of lung cancer, with one exception, HNS Green, the individuals we meet believe smoking causes lung cancer if by causation we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson apparently is now prepared to doubt the statistical evidence, and his reasoning is nowhere thought to be sound."
Tell us the significance of that and maybe in lay-person's terms a little more about causation and what it means as expressed there?
A Well, in science and philosophy, it's possible to make anything more complex than it ought

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to be. And even "cause" as a word can be made more complex. They talk about things such as ultimate cause and proximate cause and a variety of other philosophical uses where in order to be a cause, something has to always produce this result and nothing else can produce the result.

Those philosophical definitions have been floating around and confusing or been used to confuse the discussion of whether smoking caused lung cancer. But what most of us understand with the use of the word "cause" is this thing, this exposure, cigarette smoking, resulted, directly resulted, produced lung cancer. And so when that definition is used, this statement says that all of the individuals within the industry, tobacco companies, agree that that was the truth, that cigarette smoking directly resulted; i.e., caused lung cancer in human beings.

Q So in light of this report and in light of what you just said, would it be fair to say that Philip Morris and the other tobacco companies knew that smoking caused lung cancer as of the publication of this report in 1958?

A It would be fair to say that they knew and that they believed it.

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Q If we were to tally who knew that smoking caused disease, 1958 or, say, 1960, around this time, and we were to stack them all up, would this image before you on the viewer help the jury to understand a summary of that -- those different organizations and different associations who believed that at that time?

A This is a summary as of the mid-1990s of organizations. It's a small list of the organizations. You can see they are major national and international organizations. Every major scientific group that has looked at this question in the last 30 years has reached the conclusion that smoking causes disease. The only group that disputed that in the mid-1990s was the tobacco industry.

Q Referring to Exhibit 308 -- while Mr. Tauman is getting that out, you are aware of a fellow by the name of Dr. Helmut Wakeham?

A Yes.

Q And Dr. Wakeham was a scientist working for Philip Morris; is that correct?

A Yes. He was Director of Scientific Research at Philip Morris for many years.

Q Without reading the first half of this

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page, because I don't want to take too much of the jury's time and the Court's time, this is September 22nd, 1959. I'll read the first paragraph, and then I'm going to go down to the third paragraph and ask you what some of these things mean.

Let me just jump down to the third paragraph. "Whether or not cigarette smoking is a cause of lung cancer is a matter of definition. Epidemiologists, medical statisticians define cause as any factor, the removal of or absence of which eliminates disease, irrespective of any intermediate steps involved." Do you agree with that, Doctor?

A Yes.

Q "Cancer researchers now, I believe, generally agree that lung cancer is an end stage of a series of sequential changes." Do you believe that is true?

A Yes.

Q So in 1959, would it be fair to say that Dr. Wakeham understood the state of the science at that time?

A Absolutely.

Q I would like to compare that with the videotape that now Mr. Tauman will play for the jury

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that we saw on opening statement of Dr. Wakeham. This is five minutes and eleven seconds, Your Honor.
THE COURT: All right.
MR. WOBBROCK: This is 1976.
(Tape played.)
BY MR. WOBBROCK:
Q Dr. Burns, having reviewed the literature and being familiar with tobacco company internal documents and tobacco company public statements, is that statement by Dr. Wakeham, those statements in that tape, in 1976, consistent with the position of the tobacco company, including Philip Morris, that it has taken regarding the issue of smoking and health up through the years?
A It is consistent with their public positions up through the very late 1990s. It is not consistent with their internal scientific documents.
Q Is it true, as Dr. Wakeham says, that there was in 1976 a great deal of doubt that smoking causes disease?
A No. By 1976, the scientific controversy as to whether cigarette smoke can cause disease had long since been resolved.
Q I'm going to look at a few more documents again.

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Can you tell us about the constituents of smoke, what's in cigarette smoke and what's important about them?

A Well, if you burn tobacco or burn a cigarette, which is considerably more than just tobacco, you get about 4500, now, individual chemical compounds that are present in smoke that have been identified. There are some 55 of them -- somewhere between 55 and 60 that have been identified as being cancer-causing substances.

Q How long has that been known, Doctor?

A The fact that there are many cancer-causing substances in cigarette smoke has been known for over 40 years.

In addition, there are other compounds that are irritants, that are metals, arsenic, nickel, chromium, cadmium, lead, that are present in small concentrations that may make a contribution. Polonium 210 is a radioactive chemical found in the soil, which then is on the tobacco leaves and in cigarette smoke and is felt to contribute in a small way to causation of lung cancer. It is not a principle cause, but it's one of the causes.

And then there is a whole series of

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chemicals. Benzene, for example, has been very clearly demonstrated as being a dangerous chemical, cancer-causing substance. It is also present in low concentrations in smoke. There are a variety of those chemicals. They are cancer causing. They are toxic. They are irritating, and they are all inhaled together and deposited in the lung.

Q Doctor, there is a -- some compounds up there that begin with the world nitro, and I heard the interview saying nitrosaymeans, and I've heard other people say nitrosamines. What are those compounds, and what are they in regard to cancer?

A Nitrosamines, in general, they are a class of chemicals, group of chemicals, that contain a great many very potent carcinogens. They are present in cigarette smoke. Specifically, however, there are a set of nitrosamines called tobacco-specific nitrosamines that are present only in cigarette smoke or tobacco smoke or tobacco. They are formed by nitrosation or a chemical reaction with nicotine. And they are among the most potent human carcinogens.

And more specifically, they are specific for the lung. That is, if you give them to an animal by injection or in their food, they will

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develop the cancer in the lung rather than having to deposit it directly in the lung. So there is a specific selection of the lung tissue for these chemicals in their causation of cancer.

Q Make sure I have this straight. If you give this to an animal in their food or you inject it, they are going to get tumors related to the substance in their lung. And if they smoke it, they are also going to get tumors related to the substance in their lung or there is evidence that they are associated that way?

A Yes, although it is interestingly enough much harder to get an animal to smoke cigarettes than it is people.

Q One of the reasons that it's hard to get animals to -- we're getting a little off here -- but to develop lung cancer from inhalation is their life expectancy isn't long enough to have long enough exposure. Isn't that the problem?

A That's part of the problem. The principle problem, however, is they wind up being smarter than us. They don't inhale the smoke. They have developed machines -- they tried to expose animals in a cage to high concentrations of smoke. When you give concentrations that high, it will kill the

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animal; it's so toxic.
They tried to develop a picture that is more similar to the way people smoke, that is episodic, inhalation every minute or so. We put the animals in a little container and have them rotate around on these machines, and they would be exposed for, you know, ten or 15 seconds and then rotate around. The animals started holding their breath when they were exposed to the smoke. And so it really was a quite formidable problem to get the animals to actually inhale.
They also have a better filtering apparatus in the noses to remove the smoke before it gets down into their lungs. And so it is a formidable challenge to try to reproduce in animals what the human being does on their own.
Q Doctor, I'm going to show you a document authored by Dr. Wakeham in 1961, Exhibit 38; Tobacco and Health R&D approach, and then Mr. Tauman is going to turn to the first red tag. It talks about the statistical evidence. I'll read it for the record, "Linking cancer and tobacco, statistic evidence that certain diseases are more prevalent among smokers than non-smokers: Lung cancer, bladder cancer, cardiovascular disease. These

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associations suggest that smoking may be a causative factor." In 1961, what's he talking about?
A He's talking about the evidence that we have discussed on the epidemiology, the study of people with lung cancer looking backwards; the study of people without lung cancer looking forward to see who develops it.
Those cases show that people who smoke have increased rates of lung cancer, bladder cancer, heart diseases. They also show a number of other diseases as well, but those are the three he identifies.
Q The physiological tests at the bottom talks about animals treated with smoke condensate. Rather than read the whole thing, are we talking about this mouse-painting study with the stuff on their back?
A Yes. These are the studies that were done in multiple different places by different individuals after Dr. Wynder's first study where they paint the tar, itself, or fractions, pieces of the tar that contain different chemicals, on the back of animals in an effort to identify which parts of the tobacco smoke and which chemicals cause cancer.

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Q Next page, Mr. Tauman. "Partial list of compounds in cigarette smoke as identified carcinogens." This is similar to the list that you showed?

A Yes, it is. It's a substantial list.

Q And this is in the files of Philip Morris in 1961 by Dr. Wakeham, who we just saw on the videotape?

A This is prepared by one of their leading scientists, yes.

Q Next page, Mr. Tauman.

And this is on Page 6 of the same Exhibit, "Reduction of carcinogens in smoke to achieve this objective will require a major research effort, because, one, carcinogens are found in practically every class of compounds in smoke. This fact prohibits complete solution of the problem by eliminating one or two classes of compounds. The best we can hope for is to reduce a particular bad class, for example, the polynuclear hydrocarbons or phenols." Tell us what those are, Doctor.

A Well, polynuclear hydrocarbons are very complex chemicals that are formed when you burn tobacco. They are one of a class that was identified very early on as causing cancer and were

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specifically linked to causing cancer in people through exposures to people who put roofing tar on roofs of houses. There were very high levels of these polynuclear hydrocarbons in roofing tar, and those people got increased rates of cancer. Those same chemicals were identified -- multiple different forms of those chemicals were identified in cigarette smoke.

Q And just one more document from inside Philip Morris. This is Exhibit 53, going to the second page, Mr. Tauman, after you put up the first page. This is again from Dr. Wakeham to Hugh Cullman, who I think was the president of the corporation, October 24th, 1963. And the exhibit is 53; is that correct?

MR. TAUMAN: That's correct.

BY MR. WOBBROCK:

Q And again, this talks about these substances, polynuclear hydrocarbons and nitrosamines as potential cancer-causing or carcinogen agents; is that correct, Doctor?

A It identifies them as carcinogens. And it identifies them as present in smoke.

Q That last line there, "The lower, simpler nitrosamines are highly carcinogenic in bioassay

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tests." We have seen that in other documents. What does that term "bioassay" mean?

A A bioassay test is one that looks at a result in a complex system, animals or yeast cells. When you look at substances that have multiple different effects and you are trying to judge whether you can change the toxicity of something like cigarette smoke, you can't just look at the chemistry, because you don't know if you take something out and something else goes up, what the effect will be on balance.

So what you do is you have to do studies in animals or in cells so that you see the effect of the whole change in smoke on the whole organism, on the whole animal, on the whole cell, in order to define whether or not the effect that you produced or that you are attempting to produce has the outcome that you want, which is less toxicity.

Q So, Doctor, we're going to then jump ahead to 1967. We're going to look at something from the Tobacco Institute. And the jury has heard a little bit about that. They are going to hear some more about it.

But just briefly, what was the Tobacco Institute, and who was Senator Earle

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Clements, Exhibit 78?

A Well, the Tobacco Institute is a spinoff of the research organization founded by the tobacco companies. It was their public relations and lobbying group for all the cigarette manufacturers. And Earle Clements was -- I believe he had been a Senator or was in the Congress, in any event. And he was the president of the Tobacco Institute.

Q Okay. And this is a document that he authored, at least his name is on it. And I would like to read what's in yellow here. Mr. Tauman will bring it up for us. This is 1967. "The industry's position is clear. We do not pretend to know the causes of such diseases as lung cancer and heart disease; nor do we believe the critics of smoking know the causes."

First of all, at that time in 1967 -- I believe you already testified to it -- was there a clear consensus of opinion as to the cause of lung cancer or the causal relationship between lung cancer and smoking?

A Yes, there was.

Q Is it a correct statement, "Nor do we believe the critics of smoking know the causes." Is that a correct statement?

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A No, that is not a correct statement.
Q Then skipping down, "If there is something in tobacco -- this is the third paragraph highlighted -- "or in the smoke that causes cancer or any other human disease, we want to know what it is. If there is something harmful, I am confident that scientists can remedy it. To date, however, extensive chemical tests have not demonstrated any substances found in cigarette smoke accounts for human disease." Is that a true statement?
A No, it's not a true statement. It is not consistent with the work that Dr. Wakeham did that we showed earlier.
Q Exhibit 130, Mr. Tauman. This again is something from the Tobacco Institute. I would like to refer you to the paragraph that -- and Roper, I believe is a person, the Roper Proposal. Are you familiar with that, Mr. Roper?
A I believe the Roper Organization, yes.
Q The second paragraph, "For nearly 20 years, the industry has employed a single strategy to defend itself on three major fronts: Litigation, politics and public opinion. While the strategy was brilliantly conceived and executed over the years, helping us to win important battles, it is only fair

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to say that it is not, nor was it intended to be a vehicle for victory. On the contrary, it has always been a holding strategy consisting of creating doubt about the health charge without actually denying it."

Is the statement that you saw by Senator Clements, the statement that you saw by Dr. Wakeham, consistent with that strategy about creating doubt about the health charge without actually denying it?

A I believe that Dr. Wakeham's statement is. I believe Mr. Clements' statement goes beyond that. It sounded pretty much like a denial to me.

Q And in the other public pronouncements by the tobacco industry, including Philip Morris, has that strategy been followed up through the years?

A Yes.

Q Is that consistent with the Frank Statement, which indicated that they were going to cooperate with those trying to find the connection between smoking and health issues and put paramount before all other concerns the health of their customers?

A No. Not in my opinion, it's not.

Q Now, Doctor, we're going to talk about how

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do we know smoking causes lung cancer? We have got some images to show the jury, and we have got 15 minutes. We will try to do that right before lunch, if that's okay, Your Honor?
THE COURT: Proceed.
BY MR. WOBBROCK:
Q Doctor, have you written articles concerning the actual understanding in the literature between cancer and how it relates to smoking?
A Yes.
Q Have you looked at it from both the clinical and scientific standpoints?
A Yes.
Q Both in your hands-on experience with patients and also your review of the science and medical literature?
A Absolutely.
Q Have you participated in Surgeon General's reports on that subject?
A Yes.
Q Is everything known about cancer and how it occurs in the human body and why it occurs?
A No, there is a great deal that we don't understand mechanistically about all the cell and

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subcell transformations that occur that transform a normal cell into a cancer. There are many pieces of that process that we still do not understand.
Q Is it necessary to know the exact mechanism of how cigarette smoking causes lung cancer in order to understand and conclude that it does cause lung cancer?
A No. What you need to know is that one exposure produces a result. You don't have to know every single mechanistic step in between in order to know that one thing results in another.
Q Even though the precise mechanism is not understood, are there some general principles that would help us understand how cancer is caused and related to cigarette smoking?
A Yes. We understand a great deal about the process, but we don't know everything yet.
Q To understand how cigarette smoking causes lung cancer, is it important for us to understand a concept known as relative risk?
A Yes.
Q And do we have some images that would be helpful to explain that to the jury?
A Yes.
Q Could you tell us what we are looking at

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here as soon as Mr. Tauman backs that out a little bit?

A Certainly. Let me introduce it a little bit by saying that these graphs are derived from one of the large prospective mortality studies. They are studies of people who have no illness at the start of the study. In this case, a million people were followed for twelve years to see who got disease, which diseases they got and relate that back to their smoking behaviors.

The way you relate that back is to look at the rate of disease occurrence in people who don't smoke compared to the rate of disease occurrence in people who do smoke. And you can develop that as what's called a relative risk, a ratio of the two death rates or, more simply, the number of times greater that smokers develop cancer than nonsmokers.

So this is a graph from that study, American Cancer Society, Cancer Prevention Study One, where they followed a million people for twelve years. This is the data for men, and you can see that men who smoke one to nine cigarettes per day have four times the rate of lung cancer of men who smoke no cigarettes at all.

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If you smoke more than a half pack, but less than a pack, one to 19 cigarettes per day, your risk is about eight-fold increased.

Q Does that mean eight times, eight-fold?

A Eight times, eight hundred percent if you convert it to percentages, the rate at which it occurs in people who don't smoke.

Someone who smokes a pack a day, 20 cigarettes a day, has about eleven times, eleven hundred percent of the rate of lung cancer from someone who never smoked.

You go on up to more than one pack, but less than two packs, it's up around 15. And by the time you get up to two or more packs per day, you have almost 20 times the risk of someone who has never smoked, 2000 percent increase in the risk of developing lung cancer. This is what we refer to as a dose-response relationship. The higher your dose of exposure to smoke -- in this case, as measured by the number of cigarettes you smoked per day -- the greater is your risk of developing disease.

If we could take a look at the next graph, you can see another way of examining exactly the same kind of question. Because, after all, your dose of cigarette smoke is not just the number of

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cigarettes that you smoke per day; it is also the number of years that you have been smoking cigarettes. And this is the relative risk of developing -- dying of lung cancer in people who smoked for various number of years, starting at ten to 14 years and going out to 55 to 59 years. And you can see here that the longer you smoke, the more likely you are to develop lung cancer, the greater is your risk of developing lung cancer.

And we now have the two pieces of the dose-response relationship. The more you smoke per day, the greater your risk; the greater number of years that you smoke, the greater your risk. And it is a very clear, very powerful relationship that demonstrates smoking is a cause of the disease lung cancer, because this relationship has been demonstrated in this study, in multiple other studies done by different investigators, done in different environments, done in folks who work in polluted environments and don't work in polluted environments; people who live in cities, people who live in the country. It has even been done in identical twins. And in every case, it's the smokers who develop more lung cancer than the nonsmokers.

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So when you put all that together, we know that this is a relationship that is both real and causal.

Q Dr. Burns, has it also been studied the benefits that someone who smokes for a period of time will achieve if they quit?

A That's right.

Q Do you have an image you can share with the jury on that?

A You have seen the bad news. This is the good news, which is that your risk relative to someone who continues to smoke -- and after all, that's really the only option the smoker has. They can't go back to adolescence and not start smoking at that point. The only comparison that they have is that of either stopping or continuing.

So if you compare the risk for folks who have quit by the number of years they quit, it doesn't come down rapidly, but it does change.

By the time you are ten years out or so, your risk has dropped by fifty percent relative to a continuing smoker.

By the time you are about 20 years out, your risk is down to about twice that of someone who has never smoked. You have gotten rid

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of about ninety percent of the risk. There is always some risk that stays, that remains. But you have been able to get rid of ninety percent of the risk that you would have had if you continued to smoke.

MR. WOBBROCK: Your Honor, I have six images at the cellular level that Dr. Burns can explain. That gives me one minute per image if we're going to break at noon, and that might be a little fast. If the jury could like to stay ten minutes beyond the noon hour or the Court, we could finish, or we can just adjourn now and come back when the Court orders us to.

THE COURT: I think you want to eat.

THE WITNESS: Never speak in between people and a meal.

THE COURT: Members of the jury, I think we will have a break at this time. Thank you. Be back in the jury room at 1:25.

Court is out of session. I will see counsel at 1:25 this afternoon.

(Whereupon, the noon recess was taken.)

(The following proceedings took place at 1:37 p.m.)

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MR. PHILLIPS: May I put on the record --

THE COURT: As soon as we make sure the system is up and running. I'm up and running.

MR. PHILLIPS: Can you type something? You just typed something. Now, it's my problem. Could you type something again, please? Okay. We're okay.

THE COURT: All right. Counsel, you had something you wanted to put on the record, Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor, this videotape on manufacturing, we have located the one that was subject to the Castano Protective Order. We are going to deliver it to the Court today for its inspection. I will represent what I understand it to be. I haven't looked at it frame for frame.

There are two segments of two separate videos on the video that is the exhibit that they have provided for trial. The first segment is the Castano Protective Order videotape. The second segment we don't know what it is, but it's not the one that's subject to the protective order. But the first segment is identical. We're going to deliver it to the

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Court.

Mr. Tauman wants to review it to confirm what I have just said. I have no objection to him doing that as long as the Court treats and Mr. Tauman treats the videotape under seal and to be kept in the possession of the Court during the period in which he reviews that videotape.

THE COURT: Very well. All right. Bring the jury, please.

(Jury in.)

THE COURT: All right. Counsel, please proceed with your questions.

MR. WOBBROCK: Thank you very much, Your Honor.

DIRECT EXAMINATION CONT'D.

BY MR. WOBBROCK:

Q Good afternoon, Dr. Burns?

A Good afternoon.

Q We were talking about how we know smoking causes lung cancer. We reviewed relative risk and the statistics about how someone can improve their health if they quit smoking?

A Yes.

Q And then we were going to talk about

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literally what the process is as it's understood by you as a doctor and scientist and someone who has studied this and those in your field as to what happens inside the lung, the lung tissue from smoking. And are there some images that would help the jury understand that?

A Yes.

Q Okay. I would ask Mr. Tauman to put these up. And if you could tell us what we're looking at, Doctor, and explain to the jury what happens as cigarette smoke comes in contact with lung tissue and how it causes cancer?

A Okay. Uhm, we tend to think about cancer as if it were being hit by a bolt of lightning because that's the perception that people have when they are told that they have cancer. It's a terribly devastating communication from the physician.

But it doesn't happen that way. It happens very slowly over a long period of time. And gradually these carcinogens act on the inside of the cell, the DNA, nucleus of the cell, to change it.

So the first question then is what is a cancer? What makes cancer different than regular cells? If you cut yourself, those cells will grow,

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grow and heal, and you'll be fine.

Well, there are two things that differentiate a cancer cell, two major things that differentiate. The first is in contrast to your skin when you cut it, the cells that grow in normal tissue, when they grow in and touch each other, they get a signal and they stop growing. Cancer cells don't do that. They continue to grow and grow and grow and grow and grow.

The second characteristic is they gain an ability to eat away at the tissue around it. The word "cancer" comes from the Greek word grab, because the Greeks felt it looked like in people who had cancer as if they were being eaten away from inside. And the cancer is actually able to grow into and destroy the normal tissue around it.

So how does that process happen? Well, this is what your lung looks like in normal cells. And I'm going to take you through a series of transitions for a squamous cell carcinoma. This lady had an adenocarcinoma, but the process is similar in both circumstances. It's just the original cell is a little different.

This is what the normal airway looks like. Your lung is really a wonderfully protected

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system. It evolved to protect you from all the dust and things in the world around you.

The first line of protection is in your nose. Many of you who have been out in the dust and certain kinds of smoke will know that if you blow your nose afterward, there is a lot of dust in there. That's because your nose is supposed to filter it out, and it does, particularly from big particles. Because as you inhale that big particle, it has to make a corner, go around a corner and down into your lung. And a big particle has trouble making the corner. It swings out, and it sticks to the mucous membranes in the back of your nose.

The smaller particles get past that, and they get down past your voicebox into your lung, into the tube we call the trachea and the main stem bronchi, the tubes that you breath the air through.

This is a cross-section of them. This would -- this base membrane would come around like that, forming a big tube. This is just one slice of it.

In there you have cells that are tall, thin, column-like cells that are called columnar cells, and they have fine little hairs on the surface. And those hairs beat at a regular

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rhythm and move a very thin layer of water and mucous sitting on top up out of your lung into the back of your throat, and you swallow it. Normally, there is so little of it that you don't really notice it. But that's how your lung clears out the normal dust that you pick up in day-to-day life.

The first thing that happens when you inhale cigarette smoke is several of the compounds in smoke paralyze these scilla. So now the smoke particles settle on top of them, but they don't beat anymore and they won't move that stuff up and out of the lung. You have to cough it up or you have to wait for 20 minutes to an hour or so for that paralysis to recover.

The second line of defense in these cells is that they don't live very long. Just as the cells on the surface of your skin die off, flake off and fall off, these cells live maybe 24 hours. They are then dumped off into the airway, carried up out of your lung, and you either swallow it or cough it up.

These cells down in the bottom live a long time. They divide. They are earlier cells. They divide and differentiate, become more mature to become these cells. Okay.

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If we could have the next one? That's how things look normally.

Q Doctor, as you go through this, I would ask you to tell the jury the time period that this process takes, if you would?

A The very first thing that usually happens when an adolescent inhales a cigarette is to cough. Any of you who tried cigarettes as a kid may remember that you coughed with that first cigarette, particularly if you were able to inhale.

The reason why you coughed is that it is irritants in the smoke. The smoke, itself, is very irritating. And it takes awhile before your lungs can build up a resistance to that irritation.

But over the course of a couple years, maybe out as long as ten years, that repetitive dosing of irritation -- what's happening is the smoke particles are being inhaled, and they are being deposited -- they are being painted almost like the tar got painted on the back of the mice -- on top of these cells, paralyzing those cells, allowing the smoke to sit there, irritating those cells.

Those cells get cast off, get cast off, get cast off, and finally, they begin to

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respond to the irritation, much as when you work with your hands, you develop callus. The cells change. They change, and they became square, cubular. They form little cubes. They sort of hunker down in response to that continued irritation. And they lose the scilla. They lose the ability to clear with this repetitive motion all the particles in the smoke that are deposited on the surface of your airway.

Slowly then stuff gets deposited out here, gets to work its way down and begin to get into the nucleus, the center of the cell. These cells that are dividing and dividing and staying around for a long time, not being thrown off into the area, into the DNA, and it kind of wedges into that DNA. And when you go and try to replicate it, try to reproduce the cell, the DNA makes a mistake.

Now, most of those mistakes kill the cell, because they fail. But some of them just change the cell a little bit. And because the DNA has been changed, they then inherit it and all the cells that come afterward. So slowly over time, ten, 15, 20 years now, you have the next change. Now, instead of normal nucleus, round, smooth, small, the DNA inside begins to look different,

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begins to become damaged and function differently.
It becomes bigger, takes up more of the space in the cell, and it becomes irregular. This is what we call dysplasia. It isn't cancer yet. It isn't pre-cancer yet. But it means that the DNA in the cell has begun to respond to all of this irritation and the presentation of the cancer-causing substances day after day after day after day for 20 years.
Next. Then we begin to see the first changes that are really what we think of as pre-cancerous. Once again, you can see the nucleus is bigger, irregular, darker, and it becomes mottled. It's irregular in color. And this is now what we call metaplasia, which is one of the early stages of the development of a cancer. It's not a cancer yet. These cells will stop growing when they come in contact with each other. They won't invade, but they are not normal cells. And the DNA in there has been changed.
Five, ten puffs of cigarette, 20 cigarettes a day, 365 days a year, 20, 30 years, you are painting these carcinogens on top of the airway, and now the cells have really begun to change in a way that makes them almost a cancer.

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And finally, at least one of those cells makes enough change and the changes at the DNA level maybe a hundred, maybe several hundred before it gets to the point where it becomes a cancer, where it stops having the ability to stop growing and gains the ability to grow and invade.

If I could have the next? Then you have cancer. It's now got these big irregular nuclei. It's growing in an unorganized way. There aren't nice layers in there, and it won't stop growing. It grows into the center of that airway.

But this cancer is called carcinoma in situ, because it hasn't gone through the wall yet. It hasn't gone through the wall of that breathing tube. It hasn't eaten away through this membrane.

And the next stage is once it eats away through that membrane, it does one of two things that kills people.

Next? It continues to grow, take up space, surround the big blood vessels around your heart, your lungs, fill up your lungs with cancer so that you can't breathe, grow big enough to destroy the tissue in your chest. That's called local growth. And people with lung cancer quite literally

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will slowly suffocate from the growth of their cancer.

The second way it kills people is it grows through that membrane and begins to break off either into the lymphatic system or into the blood system, and then it spreads to other parts of the body. It can go to the brain. It can go to the liver. It can go to your adrenals. It can go to the bone. And that growth destroys those organs and growing in those tissues may also kill the person.

So you have got a single cell that was normal, that has gone through over the course of 20, 30, 40 years of exposure to carcinogens a steady, progressive change in the way it works as a cell until it finally makes this transition, becoming a cancer cell, one that continues to grow, won't stop growing when it comes in contact with other cells and will eat away at the tissue around it.

Q Doctor, that spread to other organs, including the brain you mentioned after it gets in the bloodstream, does that have a name?

A Yes. It's called metastatic spread, spread to other sites.

Q So when someone says they have metastatic

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cancer or they have been told they have metastatic cancer, that means they have cancer that has spread?
A Yes. And unfortunately it usually also means that there isn't any surgical cure possible for that cancer. We no longer can cut the cancer out and cure someone, because it has already spread past the site where you could take it out and remove it and the person would be cured.
Q Dr. Burns, what you have just taught this jury, have you taught other juries on these same issues?
A I certainly have. I have testified now in, gee, it must be 23 or 24 tobacco trials and often given exactly this description of the way a cancer forms.
Q I would like to shift gears now, Doctor, and talk to you about how someone becomes a smoker?
A Certainly.
Q Have you studied this subject?
A Yes, I have.
Q And have you written upon it.
A Yes. As a matter of fact, the next of my monographs is going to be devoted to adolescent smoking behavior.
Q Have you discussed it and researched it

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with other doctors?
A Yes.
Q Is it fair to say it is an aspect of your specialty and subspecialty?
A Yes.
Q Have you reached any conclusions as to why people start to smoke?
A Yes, I have.
Q Here's the problem in this case. Michelle Schwarz's mother was in this courtroom. She testified that when that Reader's Digest article came to her attention in 1952, '53, Michelle was about seven years old. And she told her not to smoke at that time.
A That's right.
Q Yet we know when Michelle was 18 years old in 1964, she started to smoke. What happens to someone between the age of seven, when they are told not to smoke and they probably agree with their parents they are not going to smoke, and all of a sudden by the time they are 18, they decide they want to smoke cigarettes? What happens?
A It's a transition. One of the most remarkable aspects of smoking is that we have been very successful in educating our kids about the

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information. You can go into any second grade class, and almost all the kids will tell you cigarette smoking is bad. And what's even more interesting is almost all of them will tell you they are never going to be cigarette smokers.

And yet by the time they turn -- graduating from high school, somewhere around 20 or 30 percent of them have become cigarette smokers.

So this isn't as though the information wasn't there. Something happens in the meantime.

Part of what happens is adolescence, and many of you remember adolescence. It was a turbulent time. It was difficult. There were lots of adjustments that you were having to make, lots of rebellion going on.

And what happens is the kids are trying to do a variety of things, including emulate adults. They want to define their own self image. They want to define who they are, and what they are and what they are going to do. Those are big questions as an adolescent.

So what happens is a series of forces begin to act on that adolescent to move them towards thinking about smoking, trying it, experimenting,

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using it with friends, using it regularly, using it regularly enough that when they try to stop it, they find they can't. And about fifty percent of high school seniors who smoke ten or more cigarettes a day say that they have tried to quit once or more and not been able to. So this transition happens.

And what happens? Why does someone take a first cigarette?

The first cigarette is not like cocaine or heroin. It doesn't produce a positive response. And if you tried to smoke, you remember that first cigarette often as being quite unpleasant. Almost everybody coughs. Some people get nauseated. Some people vomit. But in a triumph of the human spirit, kids come back and use it again. That means that it has to have some value for the kid. Otherwise, they wouldn't come back and use it again.

So what value does it have? Well, it has value of demonstrating that they are like an adult. They can pretend to be like an adult. They can pretend to be like their friends. It can adjust their internal self image, a sense of feeling inadequate. And adolescents spend almost all of their waking hours feeling anxious and inadequate.

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So where does that come from? Where does that desire for the first cigarette to adjust your attitude come from? It comes in part from the images of tobacco advertising.

What are those images? Think of the images. We don't see tobacco ads very much as adults, but think about the images, secure, confident, dominating your environment, the Marlboro man on the horse, physically and sexually attractive, confident, exciting, stimulating. You know, those are images that are attractive to all of us, but for an adolescent, who is feeling anxious about whether they are able to appear confident, as to whether they are secure, those images really ring the bell.

And the adolescent doesn't think when they put the cigarette in their mouth they are going to look like the Marlboro man, but what happens when they put the cigarette in their mouth is they feel better about being an adult. They feel less bad. The cigarette worked for them, not because it contained nicotine, not because of the chemicals, because of the image around that cigarette. That image was created in part by advertising and in part by seeing adults smoke and in part by seeing their

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parents or older siblings.
So then they try it, and then they try it again. And now we see another piece come into play, which is availability of cigarettes. If you ask adolescents whether they can buy cigarettes, almost all of them will tell you not a problem; they can buy the cigarettes, they can get cigarettes. They get them given to them by friends. They get them given to them by adults. They are able to buy them themselves in the stores. Most stores won't sell to adolescents, but that's not a problem because the adolescents know which stores will.
So the cigarettes are readily available. The kids can use them, use them regularly.
Then they form groups. Smokers tend to hang out with each other. And it reinforces that behavior by being part of that group, by the sense of identity, the sense of belonging that is so important during adolescence.
So you use them and you use them and you use them. You get the dose of nicotine, get the dose of nicotine, and the receptors in your brain are slowly changing. And now you get -- maybe you get to be an adult -- those in academic medicine,

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it's not clear we ever got to be adults. But most folks grow up. And some of the awful anxiety about adolescence moderates a bit. You say, "Gee, now I want to quit. I don't need this for self image. I have got a job. I know who I am. I'm okay." You try to stop, and all of a sudden those changes in your brain make you feel bad when you try to stop, and you don't feel okay without the nicotine.

So now not only have you built cigarettes into the way you live your life, how you associate with friends, how you deal with stress, how you deal with negative feelings, you have actually got a chemical change in your brain that you don't feel right if you don't have the nicotine present. And now the fact that you have become an adult doesn't protect you.

And what we find is that if you get to be an adult without being a smoker, you don't take it up. You are only at risk during this turbulent period of adolescence. But once you start to smoke in adolescence, by the time you get to be an adult and are ready to quit, you have trouble stopping because of the changes.

So that's how you get from second graders, who know the evidence and are absolutely

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certain they will never smoke, to seniors in high school; 20, 25, 30 percent of the kids defining themselves as regular smokers.

Q Dr. Burns, trying to step back in Michelle Schwarz's time, in 1963 when she was 17, in 1964 she was 18, at that time was there a different form of advertising cigarettes that was much different in communicating those images that you spoke of than there is now?

MR. PHILLIPS: I'm going to object to this. This is not the witness to talk about advertising. He does not have the expertise. It's beyond his credentials.

MR. WOBBROCK: Your Honor, we're not going to go into any great detail. I just ask about the form of the advertising. Then our other expert will talk about the images. The doctor has already testified without objection as to what influences are upon people from the time of seven to the time of 18.

MR. PHILLIPS: I'll make an objection after the fact to that testimony, Your Honor. It's entirely speculative.

THE COURT: All right. We'll let him testify to the form of it. Go ahead.

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BY MR. WOBBROCK:

Q What form of advertising was in existence, Doctor, when she was 15, 16, 17 years old in 1961, '62 and '63?

A Prior to 1970, tobacco was a major source of advertising revenue for the television networks. TV ads were all over the television networks, and many of those TV jingles, as a matter of fact, are still ones we remember to this day.

Q I'm going to show you an exhibit. I believe it's 107. Is that correct, Mr. Tauman? And this is a draft of a speech to be given by a Mr. Dunn, a Dr. Dunn, Annual Report to the Philip Morris board by VP of Research and Development, considered too technical, fall of '69, Why One Smokes. And I would like to bring your attention to the next -- the page that's got the red marker on it, the yellow highlighted portion there.

A I have to be careful watching the screen before settling down. I get dizzy. There we go.

Q 107. "We are not suggesting that the effect of nicotine is responsible for the initiation of the habit. To the contrary, the first cigarette is a noxious experience to the novitiate."

I told the jury the only time I heard

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the term novitiate before was referring to people that were new in religious orders.
A That's true. Train with the Jesuits, that has a very real meaning. That generally applies to anyone who is new at anything.
Q "Accounting for the fact that the beginning smoker will tolerate the unpleasantness, we must invoke a psychosocial motive." Psychosocial, what does that refer to?
A That means a motivation that comes either from your internal psychological needs or for your social needs, your need to interact with those around you. Smoking a cigarette for the beginner is a symbolic act. The smoker is telling his world this is the kind of person I am. Surely there are many variants of these: I am tough; I am adventurous; I am not a square. Whatever the individual intent, the act of smoking remains a symbolic declaration of identity."
Q Doctor, this is in Philip Morris' own files. Does this show that they were aware of the phenomena that you previously described about why people smoked?
A Yes.
Q Why they change from not wanting to smoke

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at an early age to wanting to smoke?

A Yes, it does.

Q Referring to the next line that's highlighted?

"As the force of the psychosocial symbolism subsides, the pharmacological effect -- let's talk about that just for a second.

Dr. Benowitz told us, but one more time, what does pharmacological mean?

A Addiction.

Q "The pharmacological effect takes over to sustain the habit augmented by the secondary gratifications." Again, does that show that Philip Morris had an understanding in their files as to why kids change from not wanting to be smokers to wanting to be smokers?

A Yes, it does. The secondary gratification that they talk about here are things like being able to express yourself, having a cigarette with coffee or on the phone. The kind of rituals and habits that build up around cigarettes.

Q Then looking to Exhibit 109, two red tags there, Mr. Tauman. If you would show the front cover. Dr. Wakeham, 1969 Presentation to the P.M. Board of Directors. "I think there is one we're

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interested in. The act of smoking is symbolic. It signifies to an adult that he smokes to enhance his image in the eyes of his peers. But the psychosocial motive is not enough to explain continued smoking. Some other motive takes over to make smoking rewarding in its own right. Long after preoccupation with self image has subsided, the cigarette will even preempt food in times of scarcity in the smoker's priority list." Would you agree with that, Doctor?

A Yes, I do.

Q Does that show at the highest levels of Philip Morris in 1969 they were aware of this phenomena about why kids change their mind to smoke?

A It certainly shows that at this level they were well aware of it.

Q I want to ask you on that related subject about how somebody becomes a smoker. We'll look at this document. Showing the front page, the date and the author and page 3 there, Mr. Tauman. Exhibit 2 for the jury. This is October 7th, 1953, from George Weissman, who we understand to be a Vice-President of Marketing. I'll ask you to jump to page 3. "Encouragingly enough, we have our greatest strength in the 15 to 24 age group. As

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against Camel and Chesterfield, we are proportionately stronger among older age groups."

Now, my question to you is this, Doctor: This shows as of 1953 they are encouraged by their penetration of the 15 to 24 year old age group in the sale of their cigarettes. Does this show that Philip Morris actually studied young people and their smoking habits down to the age of 15?

A Yes. This is a study of that group.

Q I'm going to show you a one-page document, document 353. This will take a little more reading. I'm going to ask you the significance of this document regarding how someone becomes a smoker and Philip Morris' involvement in that.

In March, 1973, Opinion Research Corporation conducted a national -- maybe we could go back, Mr. Tauman, before I read this and show the date, May 18th, 1973, Incidence of Smoking Cigarettes. There we go.

"In March, 1973, Opinion Research Corporation conducted a national probability sample among 2,060 respondents, 18 years of age and over, 962 males and 1,098 females, in which they asked two questions for us" -- us being Philip Morris; we have

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a Philip Morris document. "Do you smoke cigarettes, that is at least a pack a week? And if yes, how many cigarettes do you usually smoke per day now?" In addition, those same questions were asked of a national probability sample of 452 teenagers, age 12 to 17.

MR. PHILLIPS: Your Honor, may I -- I object. Excuse me, Mr. Wobbrock. This document has not been admitted into evidence, according to my records, and I would like to confer with the Court regarding it.

THE COURT: Counsel?

MR. WOBBROCK: I'll get my list, Your Honor. I gave it the wrong number, 353, Your Honor. I said 352.

(Whereupon, a discussion was held at the bench, off the record.)

MR. WOBBROCK: I'll just go on to something else, Your Honor.

Your Honor, rather than doing that, I think it's clear that this has been pre-admitted, but I will show the Court at this time the --

MR. DUMAS: Could we do this outside the presence of the jury?

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THE COURT: Why don't we do that. Members of the jury, why don't you step out to the jury room for a few moments. We'll take up this issue out of your presence. Thank you.

(Jury out.)

THE COURT: Does either counsel have a problem if the doctor remains on the stand?

MR. PHILLIPS: Sorry, forgive me.

THE COURT: Does either counsel have a problem with the Doctor remaining on the stand while we do this process?

MR. PHILLIPS: I don't, Your Honor.

THE COURT: Why don't you just have a seat and relax.

MR. WOBBROCK: Your Honor, I'll clarify whether this has been pre-admitted or not, which I'm pretty sure that it was. But even if it wasn't, I don't see why -- it's an internal Philip Morris document. It is on the Philip Morris web site. It has been already ruled by the Court long ago that this line of questioning is relevant and admissible, and it should have been -- we should have been able to offer it in front of the jury and have the Court rule.

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There is no reason for the jury to have to leave when I offer an exhibit. But I think it's all a tempest in a teapot, because you are going to find out momentarily that the only thing that was argued against it was their Motion in Limine about youth marketing, which the Court overruled, and that is the only objection they made.

MR. PHILLIPS: Your Honor, that is a completely opportunistic argument by Mr. Wobbrock, but it does present a problem that we both have. So let me deal with this document, and then let's deal with the bigger problem.

First off, you don't show a document to the jury if you don't know it's already been readmitted. Now he's giving an argument why it should be shown to the jury. That is inappropriate, even though Mr. Tauman designated testimony from another case. I don't show exhibits that were referenced in the testimony. He shouldn't have shown it to the jury.

Second, when the Court ruled on the youth marketing question, you made some general

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observations. Now, obviously, Mr. Wobbrock has drawn his own conclusions about those general observations. I guess I would like to draw some conclusions about mine. This witness is obviously going to testify as broadly as Your Honor let's him on the issue of youth marketing.

This is a 1973 document. He's talked about Marlboros and Camels and everything else in a Merits case, Your Honor. In a case in which this woman started smoking in 1974, he's starting with 1973 with respect to what was being studied, with respect to youth marketing or youth smoking or youth smoking trends and things like that.

Now, as I recall Your Honor's guidance at the time, it was, look, I think it's relevant to when she began to smoke. In other words, there will be a window of time prior to 1964 when I think I'm going to give Mr. Wobbrock some liberty on this question. And that's why, even though I didn't like what I was hearing and the extent of it, I did not object.

Now, he's showing you a 1973 document, and he's doing that for the purpose of showing

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youth smoking as a focus of the company throughout time. But that has nothing to do with Michelle Schwarz. Of course, we can distinguish these documents and spend a lot of the case time talking about that, that they are related to public studies, not Philip Morris studies and so forth.

But the question is what are we going to make this case into? Are we going to make it into a plenary case because, obviously, Dr. Burns is talking about other brands and tobacco advertising generally. He's doing exactly what Mr. Wobbrock wants to do and was the purpose of trying to limit this case in some reasonable way to a case about Michelle Schwarz and Merit cigarettes.

Now, this document, in my view, Your Honor, is exactly the kind of document that you were contemplating an objection to based on the guidance that you gave us with respect to the time period when you believed that knowledge of youth smoking and innocence Michelle Schwarz may have had were at issue. Obviously I disagreed with that at the time, but I'm guided by that for purposes of our discussion today.

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This document was written at a time when she was close to 29 years old, Your Honor, 28 years old, smoking a completely different product than the one that's the subject at issue. So I think it should not be -- it's highly prejudicial. It should not be admitted, and it certainly shouldn't have been shown to the jury without getting clearance.

Let me deal with the second issue, because this is really just an illustration of the problem we have not solved pretrial here. That is what are we going to do about all those other exhibits which Mr. Wobbrock and I seem to have differing opinions on as to whether they are in or not in in light of the rulings on in limine motions? I think there -- I don't want to be dealing with this in front of Mr. Wobbrock all day long. I realize he wants to put his witness on. I don't want him to be doing it with me when I have my witnesses. I want to know about admissibility. So there is an issue there. I'm sensitive to it.

I would like to resolve some of those issues. But until we have got that resolved, I have got to raise this issue with the Court and

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ask they not be shown to the jury until the Court has ruled on admissibility.

MR. WOBBROCK: Your Honor, if I might, with all due respect to Mr. Phillips, I don't understand the nature of his -- we'll take the first one, his first objection, then I'll ask Mr. Tauman to speak to the general problem about exhibits.

The first objection, I listened to him talk for seven minutes. The only thing I heard him say was prejudicial. If he's making a 403 objection --

MR. PHILLIPS: It's required.

MR. WOBBROCK: Just a minute. I never interrupt you.

MR. PHILLIPS: Excuse me. I apologize.

MR. WOBBROCK: If he's going to make a 403 objection, then that's one thing. That's clearly within the Court's discretion. And that's the only objection I heard. And I think it's entirely consistent with the Court's prior rulings to consider it relevant for this reason.

In 1953, when she's seven years old, we show they are encouraged by penetration into

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the 15 to 24-year-old market. We just showed that exhibit. This exhibit shows that they are continuing that trend. It offers an inference that they have had that policy and they are continuing that policy.

If you would move that up a little bit, Mr. Tauman? You will see they studied 12 to 17 year olds and the incidence of their smoking.

Now, if they are going to have an interest in youth smoking, the inference is that they made a heck of an effort to market this to her when she was in the formative ages of choosing to smoke, precisely that which they are alleging comparative negligence upon, that she was negligent in this case. And we are entitled to demonstrate why she did what she did, which was entirely consistent with their efforts to get her to do what she did. In other words, to get her to smoke.

The fact they continued to market this stuff to kids and research kids and understand why kids smoked is consistent with the prior memorandums that you have seen internally to Philip Morris about why one smokes. And they studied that. They continued to do it, and

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they continued to do it for years. And this shows that they had that policy. That's one basis of relevance.

The second basis of relevance, it goes directly to punitive damages, their wanton and willful conduct.

The third reason it's relevant, if she's now in her mid-20s and smoking, but there is still efforts to get other young people to smoke, it goes to this friendly familiarity business about why everybody is smoking around you, it can't be so bad. How can it be so bad if everybody is smoking? And their efforts to mass market to kids goes directly to that issue.

So that's the basis of the relevance. I haven't heard any other objection. I think there may have been an objection to this, and we'll find out as soon as Mr. Lane gets over here with the documents based upon the youth marketing, which you overruled, rightly so. So that speaks to Mr. Phillips' first argument.

Now, as to the general problem with exhibits, let me say this, then I'll hand it to Mr. Tauman: They inundated us, Your Honor,

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with about 800 documents. If you recall, we gave the Court a Polaroid picture, 800 different exhibits, seven boxes full, of which they have now withdrawn over 150 exhibits based upon the Court's ruling that they were blatant hearsay. They were nothing but text books and articles that fell within no exception. Yet Mr. Tauman, Mr. Lane and I -- I'm not looking for sympathy, but we lost a lot of sleep looking at those documents so we could pose those objections. Once we posed them, they withdrew them.

Now, if they have got themselves in a logistical pickle that they can't get these things ruled on exactly when they want to, it's partly of their own making.

We submitted one box to this Court for review and to them. They submitted seven, of which they have withdrawn two and a half.

Now, they say, "Well, you haven't had a chance to look at it." Well, I've seen some efforts at gamesmanship, but that is exactly one of them in this case. And so I would say to you if they have a problem about getting their exhibits ruled upon, it's one of their

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own making.
THE COURT: All right.
MR. PHILLIPS: Do you want to pass this to Mr. Tauman before I respond?
THE COURT: Yes, pass it on to him.
MR. TAUMAN: You know, Your Honor, the only thing I have to say is that as Mr. Phillips reflected, from the beginning, it's a quandary that both parties find themselves in. We're happy to be guided by the wisdom of the Court on how to deal with this for future incidents where this came up.
Both parties have lodged objections. This one, I think, actually is one of the easiest ones to deal with. There may be even thornier ones coming up.
We're trying to make this so that it runs as expeditiously, as smoothly as possible. If Your Honor has guidance for us, we're happy to accept it. But it is a quandary that both parties find themselves?
MR. PHILLIPS: At least Mr. Tauman concedes the fact this is a mutual problem and not one the result of my gamesmanship.
Your Honor, clearly, the bigger issue is

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what are we going to do with these exhibits? We have talked with you about them on a couple of occasions. We continue to want a solution to that problem.

This document at this moment with this jury that's waiting for us, I think I have been fairly accurate in characterizing how you dealt with the youth smoking issue. I thought you drew a line around a period of time and that that would be legitimate.

The reason we brought the Motion was it was highly prejudicial to be talking about youth smoking, because it's a highly, emotionally-charged issue. That's why Dr. Burns wants to talk about it in the context of a woman who started at the age of 18 after the Surgeon General's report was issued. Now we're talking about other stuff. We'll spend a lot of time in trial explaining this is not marketing to kids and everything else. We'll be doing the '70s and '80s. We'll been talking about products. We haven't heard anything about Benson & Hedges or Merits or anything so far from any of their experts. I mean, at some point, the Court has to begin to impose some

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burden upon the plaintiff to talk about his case, not the punitive case, without any connection to liability in the case. And that's what I'm trying to do with this document. This document is highly prejudicial. He just wants them to be real angry at my client without caring about whether or not Benson & Hedges or Merit advertising can bare the burden of these accusations.

And so I think it is highly prejudicial. And, of course, with a 403 objection, you are always weighing relevance against prejudice. I think it's extremely irrelevant to the guidelines, particularly in light of the guidelines that you gave us regarding youth smoking. And it's obviously prejudicial.

THE COURT: All right. Thank you. On the second part, since we are in this quandary about those exhibits the Court has not made a ruling on, we will just have to take the long, slow, traditional route. Before they are shown the trier of the fact, the jury, it's offered, the Court gets a chance to look at it, hear counsel; the Court get to make a decision unless you make a global settlement on those.

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That's about the only way we can do it.

MR. TAUMAN: Your Honor, may I inform the Court about this specific exhibit?

THE COURT: You may.

MR. TAUMAN: As you can see there on your screen, Your Honor, Exhibit 353, as the Court knows, this is their formal objections. And this is filed by the defense. And it is -- as I suspected, this is something that I think this bridge has been crossed. Here's 353.

Their only objection is it violates their Motion in limine number six regarding underage smoking, which this Court already overruled. And so there was no reason to stop the progression of this trial at this point on the admissibility of this document unless they want to reargue to you what you have already decided.

MR. PHILLIPS: I think that the problem, of course, Your Honor, is the way you decided it is you did say some stuff would be, and you said that some stuff might not be. And that's why we're here. He's obviously interpreted that ruling -- I'm not going to suggest that he wasn't interpreting it in good faith for

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purposes of thinking it might be admitted. But the Court has now ruled on this document. In light of the guidance that you gave us, I think you should rule otherwise than with respect to those documents that are pre-1964.

MR. WOBBROCK: Here's the issue regarding the Court that I recall, but it has been some time. There was some issue about underage marketing things before she was alive. And that's what the Court drew the line on, when she was like four or five years old. That's where the Court drew the line. And now that she's started smoking and continuing to smoke, this subject is relevant as to how they continued what had previously been a policy to look and discover why young kids smoked, to study them, to continue to study them and what it proves. The inference it it's consistent with their former behavior and current behavior. It goes to the issue of punitive, and it goes to the issue of her sustaining her smoking.

I'm starting to repeat myself. But why did she continue to think it's a reasonable activity? Because it's all around her.

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THE COURT: Thank you, counsel.

You stood up. You have something you wish to add, you may do so.

MR. DUMAS: Very briefly, because I argued this Motion. And the Court's thinking at the time was that these kinds of documents, the underage documents, would be perhaps relevant in a limited time frame, and the Court talked about the time when she was underage. That might bear some relevance in the 403 analysis, you seemed to feel over my arguments to the contrary -- you felt that those might -- the probative value would outweigh the prejudicial value. This is 1973. This is long since after she was underage. I recall the Court's comments on that at the time.

MR. WOBBROCK: I might say this, Your Honor: The statute under which we are all operating, ORS 30.925, the punitive damage statute, allows the jury to consider how long their bad conduct continues. And this goes directly to that. That's in the statutory language of the controlling statute on punitive damages. 30.920 -- 5.

MR. PHILLIPS: Six.

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MR. WOBBROCK: Mr. Tauman obviously should argue that aspect of it, because he knows more about it than I do.

MR. PHILLIPS: The statute also requires punitive damages, Your Honor, to be in relation to the harm to the plaintiff. And a case in which the focus is on whether or not Philip Morris was doing anything to try to market to Michelle Schwarz, whether it had any impact on her whatsoever in her decision to smoke, the time period should be the one that you limit yourself to.

Your Honor, I'll just remind you that Judge Brown excluded it altogether with respect to someone who started after the age 18.

MR. WOBBROCK: That's because Mr. Williams started smoking when he was 20, when he was in the Army.

MR. PHILLIPS: That's a distinction without a difference, Your Honor. But in any event, it seems to me your limitation should be adhered to here as opposed to leaving it wide open and having any document they want and drawing attention to youth smoking at any time frame.

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THE COURT: Counsel, I think what the Court is going to do at this time is probably make a Solomon-like ruling that will not make either party happy. I think in looking at the document, the Court will allow plaintiff to use the document for the 18 years-plus information, and at this point in time, keep out the material from 12 to 17.

I will give further consideration to this matter later on. That decision I just made may be amended. Because if you look at the document part on the first line, that's not underlined, deals with 18, plus. The bottom line that's underlined deals with the 12 to 17. Then up in the top area, 452 teenagers, ages 12 to 17, the Court is going to at this time make a ruling that information regarding those ages will not be permitted at this time.

The Court would be open for further consideration. I did look at the punitive damage -- the punitive damages statute, and it does give some indication that if a jury gets to that point, one thing that the jury can consider is the duration that the other party participated in a certain type of activity.

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Potentially this would fall under that exception. I am not making the ruling to that extent at this time.

MR. WOBBROCK: Your Honor, I have got to say I'm a little confused with the Court's ruling. I have several more documents on the same subject, and they talk about marketing in the 15-year age group -- all right. Mr. Tauman has suggested this, Your Honor, if I might. I'm going to do this in an offer of proof just before the Court. Then after the Court has had a chance to further consider it, perhaps we have argued it further, if we have to, we'll order the transcript and read it and put the exhibits up at that time. Okay.

So, Dr. Burns, what we're going to do now is I'm going to ask you these questions without the presence of the jury, and then we'll go back to the testimony after we finish this with the jury present. All right.

MR. PHILLIPS: Excuse me for one second.

BY MR. WOBBROCK:

Q Then referring to Exhibit 353, this is a 1973 exhibit, Dr. Burns. Does it show -- does this exhibit evidence any effort by Philip Morris to

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study the smoking habits of 12 to 17 year olds?
A Yes, it does. It directly demonstrates that they had asked for the inclusion of two questions that specifically deal with the smoking behaviors of 12 to 17 year olds. They included that age group in the analysis.
I would also add that it is a document labeled, "The Incidence of Smoking -- incidence means starting of smoking rather than simply the prevalence of smoking. So it is intended to look at how smoking starts rather than just the number of people who smoke; although the data, itself, is on the number of people who smoke.
Q Based upon your review of internal company documents and your understanding of Philip Morris' efforts to market towards children, what is the purpose -- what is their purpose of studying this subject?
A They are interested in defining the changing smoking behaviors of adolescents. In contrast to adults, there is a new crop of adolescents every couple years. So it's very important if you are interested in that age group to track what's happening to them on a regular basis, because an adolescent who is 16 today is quite

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different from an adolescent who is 16 five years ago. They have different values. They have different things that excite them. They have different imagery that they respond to. Therefore, they may also have different behaviors.

MR. PHILLIPS: I recognize this is an offer of proof. I need to make an objection. I move to strike that response as speculative and outside the expertise of this witness.

THE COURT: All right. Overruled at this time, counsel. Proceed, please.

BY MR. WOBBROCK:

Q And Dr. Burns, based upon your review and understanding of cigarette company documents, in particular Philip Morris, is this sort of study and behavior of this company consistent with behavior that occurred earlier in this corporation?

A Yes.

Q Particularly around 1960 to 1964?

A Yes.

Q I'm going to ask you to look at another document, 150. I'm going to ask you to look at two pages of this document. This is a document May 21st, 1975.

For the record, I will read into the

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record this is from Dr. R.B. Seligman -- you recognize his name as one of the Vice-Presidents in charge of Research and Development at Philip Morris?
A Yes.
Q From Myron Johnston. "The decline of the rate of growth of Marlboro Reds. It is my contention that Marlboro's phenomenal growth rate in the past has been attributable in large part to our high market penetration among younger smokers and the rapid growth in the population segment."
Then it goes down to say, "In my opinion, the decline in Marlboro's growth rate is due to four factors: Slower growth in the number of 15 to 19 year olds."
Question: Does that show a concern of Philip Morris on the sale of their product to 15 to 19 year olds?
A Yes.
Q Does it show an effort to try and understand why and how 15 to 19 year olds choose Marlboro to smoke?
MR. PHILLIPS: Objection, calls for speculation.
THE COURT: All right. You may have your objection. The Court is going to overrule it.
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Go ahead, please.

A It shows they were interested in defining the contribution of the 15 to 19-year-old age group to the number of Marlboro cigarettes that they sold.

Q And is this consistent with their behavior that they -- that you are aware of, not only after 1953, when Michelle Schwarz was about seven years old, but then in 1960, when she was 14 years old to 1964 when she was 18 years old. Is this kind of document consistent with their behavior at that time?

A Yes.

Q And again the fourth page of this document, Marlboro smokers being on the average considerably younger than the total smoking population, tend to have lower than average incomes. Thus I would expect a disproportionately large number of Marlboro smokers to quit smoking or reduce daily consumption.

In addition, young smokers are less habituated than older smokers and can therefore probably quit or cut down more easily than an older smoker.

Furthermore, many teenagers, who might otherwise have begun to smoke, may have

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decided against it because of the adverse economic conditions."

How much depth of understanding of people under the age of 18 does this document reveal on behalf of Philip Morris?

A A great deal.

MR. PHILLIPS: Objection, calls for speculation. I think I'll just ask nor a standard objection as to the speculative nature of this testimony, Your Honor.

THE COURT: All right. You may have a standing objection, counsel.

Proceed, please.

A It demonstrates a considerable understanding, and they are particularly concerned in this about the impact of the recession on adolescent smoking initiation.

Q Initiation meaning what, Doctor?

A Starting to smoke, frequency with which adolescents are starting to smoke.

Q Referring to Exhibit 190, March 29th, 1979, on Philip Morris it looks like letterhead, "Marlboro represents sixty percent of Philip Morris U.S.A. sales." Down to demographics: "Marlboro dominates the 17-and-younger age category, capturing

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over fifty percent of this market."

Again, Dr. Burns, is this kind of study and research and understanding of their product consistent with what they were doing at the time Michelle Schwarz was, say, ten to 18 years of age?

A Yes.

Q On the second page, it talks about special programs. Are you aware of some of their marketing efforts?

A Yes.

Q Sampling and stuff, things like that?

A Yes.

Q Resort coverage in existence for eight years, meaning going back to 1971 -- I don't know exactly -- let me put it this way: What is resort coverage? What does this speak to, special programs regarding resort coverage and summer sampling?

A It describes a more comprehensive marketing approach than emotional approach beyond that of simply advertising, where you are using the presence or visibility of T-shirts, hats and other branded merchandise to create an impression that large numbers of people are using a product. In this instance, large numbers of young people.

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Q And this is Exhibit 211, March 31st, 1981 entitled, "Young Smokers, Prevalence and implications and related demographic trends, Myron Johnston." Summary -- and I'm just bringing your attention to the first two sentences. I'll read it for the record. "It is important to know as much as possible about teenage smoking patterns and attitudes. Today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens."

What does this evidence about Philip Morris' understanding about their marketing plans and who supports their product?

A They understand that they are future consumers. Their future consumers are almost entirely limited to that group which initiates as adolescents.

Q Finally, average daily consumption of these young smokers also increased so that between 1968 and 1974 the number of 12 to 18 year olds who smoked ten or more cigarettes per day more than doubled. Now, that would have been four years after Michelle Schwarz started to smoke in 1964. Does this show an understanding of the demographic trends

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and the use of their product by 12 to 18 year olds in a period of time within four years of her starting to smoke?

A Yes.

MR. WOBBROCK: Your Honor, that's our offer of proof. I won't take the Court's time but to say for three reasons I think it's admissible and certainly relevant. The only objection I have heard is a 403 objection. Those are clearly Philip Morris documents. It's relevant for the continuing conduct, some of it as much as four years after she began to smoke, to show if they had done that back in the '60s and continuing to do it, they probably did it back in the '60s if they are still continuing to do it. The inference they did it once; they are still continuing to do it.

And thirdly, particularly that resort business, but it all ties together. This is what's in the air. It's everywhere. They have alleged she's comparatively negligent. We're in effect defending her choice. They put this stuff everywhere. They are mass marketed, and they lead her to believe it was a reasonable activity. I think it's directly bearing on the

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issues in this case and certainly is not unduly prejudicial. It's the facts. It certainly doesn't lead the jury down the wrong road.

THE COURT: Okay. Thank you. The Court is going to take an additional 15-minute break. Then we'll come back, bring the jury back in 15 minutes. The Court is out of session at this time.

(A short recess was taken at 2:50 p.m.)

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STATE OF OREGON)
) ss.
County of Multnomah)

I, Estelle T. Keating, Official Court Reporter of the Circuit Court of the State of Oregon, Eleventh Judicial District, certify that I reported in stenotype the foregoing proceedings in the above-entitled case.

I further certify that my stenotype notes were reduced to transcript form by Computer-Aided Transcription under my direction.

And I further certify that pages 1 through 86 contain a full, true, and accurate record of my stenotype notes.

Dated this 12th day of February, 2001, at Portland, Oregon.

_____
Estelle T. Keating

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MULTNOMAH COUNTY

THE ESTATE OF MICHELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ, Plaintiff-Appellant, vs. PHILIP MORRIS INCORPORATED, a foreign corporation, Defendant-Respondent, Defendant-Appellant, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon CORPORATION, Defendant.	Appellate Case No. A118589 Circuit Court Case No. 0002-01376

SUPPLEMENTAL NOTICE OF FILING AND PROOF OF SERVICE

I certify that the original transcript of the above case, in which the portion I reported, consisting of one volume was filed on September 11th, 2002.

I certify that I portions of the record, Volume 26B, February 13, 2002, which was inadvertently left out of the previously filed volumes: 20D, February 5,2002; 21C, February 6,2002; 22C, February 7, 2002; 23B, February 8, 2002; 24A, February 11, 2002; 25B, February 12, 2002; 27A February 14, 2002; 29C, February 19, 2002; 30C, February 20, 2002; 31B, February 22, 2002; 33C, February 26, 2002; 34C, February 27, 2002; 35C, February 28, 2002; 38C, March 5, 2002; 39C, March 6, 2002; 40B, March 7, 2002; 41A, March 8, 2002; 42A&C March 11, 2002; 43C, March 12, 2002; 44C, March 13, 2002; 46C, March 15, 2002 were reported by Estelle Keating and filed for purposes of appeal.

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I certify that the original copy of this certificate was sent US Mail/Shuttle to the Court Administrator on September 11th, 2001.

I certify that, in compliance with Oregon Revised Statutes, that I have served (by personal service/U.S. Mail) a copy of this certificate, together with a copy of this transcript on:

Representing Plaintiff-Appellant
The Estate of Michelle Schwarz,
by and through her personal representative
Richard Schwarz:
Charles S. Tauman, Esq.
Bennett, Hartman, Morris & Kaplan, LLC
P. O. Box 19631
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Representing Defendant-Respondent
Philip Morris, Incorporated:
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And:

Clerk of the Court of Appeals
Attention: Cheryl A. Alex
Supreme Court Building
Salem, OR 97310

_____

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